Supreme Court, U.S.
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No. 991591

In The

Supreme Court of the United States

JOHN GOODE,
d/b/a Mr. Bones BBQ,

Petitioner,

v.

CITY OF AUSTIN, TEXAS and
FINE HOST CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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63pp

QUESTIONS PRESENTED

Whether an African American businessman who is not certified and refuses to become certified as a minority owned business under a city affirmative action ordinance, has standing to sue for intentional racial discrimination under 42 U.S.C. § 1981 the city contractor who terminates his subcontract because he is not certified in order to replace him with a certified African American.

Whether an African American businessman who is not certified and refuses to become certified as a minority owned business under a city affirmative action ordinance, has a cause of action for intentional racial discrimination under 42 U.S.C. § 1981 against the city contractor who terminates his subcontract because he is not certified in order to replace him with a certified African American.

Whether an African American businessman who is not certified and refuses to become certified as a minority owned business under a city affirmative action ordinance, has standing to challenge that plan under 42 U.S.C. § 1983 when a city contractor terminates his subcontract because he is not certified in order to replace him with a certified African American.

Whether the Fourteenth Amendment guarantee of Equal Protection and the prohibition of intentional racial discrimination in 42 U.S.C. §§ 1981 and 1983 are subject to a *de minimis* exception which allows a governmental entity to condition equal treatment to minority businesses upon their compliance with a government certification process.

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PETITION FOR A WRIT OF CERTIORARI

John Goode respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1-4) and the district court's opinions (App. 5-24) are unreported.

JURISDICTION

The court of appeals entered its judgment on November 10, 1999 (App. 1-4). Timely filed petition for rehearing was denied December 17, 1999. (App. 27) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of Art. 14, U.S. Const. provides, in relevant part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1981. Equal Rights under the Law, provides, in relevant part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all

laws and proceedings for the security of persons and property as is enjoyed by white citizens, . . .

(b) . . . the term "make and enforce contracts" includes the . . . termination of contracts, . . .

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The City of Austin, Texas affirmative action ordinance, AUSTIN, TEX. ORDINANCES ch. 5-7, is voluminous and therefore pertinent parts are reproduced in the Appendix. (App. 29-39)

STATEMENT

Petitioner, John Goode, an African American man, sued the respondents, City of Austin, Texas (City) and Fine Host Corp., in the U.S. District Court for the Western District of Texas for violation of 42 U.S.C. § 1983 and § 1981 respectively as a result of Fine Host terminating Goode's subcontract to provide barbeque at City venues

because Goode was not, and refused to become, certified as a minority owned business under the City of Austin affirmative action ordinance. AUSTIN, TEX. ORDINANCES ch. 5-7. Fine Host replaced Goode with a certified African American barbeque vendor. Original federal jurisdiction was predicated on 28 U.S.C. § 1331. The district court granted summary judgment to both Fine Host and the City finding that Goode lacked standing because he had not suffered an injury in fact. The Fifth Circuit Court of Appeals agreed with the district court and affirmed in an unpublished opinion which concluded that Goode had no standing "[b]ecause the 'intentionally discriminatory race and gender conscious goals' of which Goode complains benefitted rather than injured him . . . " (App. 3-4)

A. The City's Affirmative Action Plan

The City adopted by ordinance an affirmative action plan in 1987, as amended in 1996. AUSTIN, TEX. ORDINANCES ch. 5-7. (App. 29-39) The City certifies minority and women owned business enterprises (M/WBEs) based on several criteria, most importantly 51% ownership and control by minorities or women. § 5-7-4. (App. 31) The City sets goals and subgoals for M/WBE participation in each City contract and monitors compliance with those goals. (App. 34-38) The City ordinance also provides that if a contractor fails to meet the goals, the City may bar the contractor from City contracts for up to five years, assess monetary fines, or sue for breach of contract. § 5-7-26. (App. 38-39) The contractor may avoid meeting the goals only by demonstrating "good faith efforts" to recruit M/WBEs. § 5-7-22(E). (App. 35-38) City contractors are

not required to award any subcontracts to M/WBE firms if that would increase the contract cost, however, the City has rejected bids where the bidder failed to make good faith efforts to meet the goals.

B. Goode's Contract and its Termination

In 1989, Goode contracted with Fine Host's predecessor, Volume Services, to provide barbeque at City venues. In 1992 at Volume Services' request, Goode became certified by the City as a M/WBE. Certification was for one year, and thereafter Goode chose not to be recertified because of concerns about his privacy. (App. 2, 10) Goode continued with Volume Services from 1993 without certification until the City replaced Volume Services with Fine Host in the summer of 1995.

The City's contract with Fine Host provided Fine Host a management fee for operating its venues. Thus, using subcontractors did not affect Fine Host's payments from the City, only the City's profits or losses. This arrangement, along with the City's requirement of good faith efforts in hiring M/WBEs, resulted in Fine Host hiring *only* certified M/WBE subcontractors because hiring any subcontractor would decrease the City's profits and the City would accept decreased profits paid to certified M/WBE subcontractors, but not uncertified subcontractors. Fine Host believed that lower City profits due to using uncertified subcontractors would adversely affect its contract with the City.

In the summer of 1995, Fine Host contracted with Goode to provide barbeque at City venues.[1] The contract did not mention Goode's status as a minority or City certified M/WBE (App. 9); however, Fine Host claimed that it contracted with Goode only because it believed Goode was a City certified M/WBE, and that Goode so represented to Fine Host. Goode denied making such a representation. Fine Host claimed that had it known Goode was not certified in 1995, it would not have contracted with Goode, or any other non-minority or uncertified minority subcontractor. (App. 10)

In 1996, when Goode's contract came up for renewal, Fine Host demanded Goode become certified as a M/WBE. When Goode declined, Fine Host terminated his contract. In a letter dated August 2, 1996, Fine Host stated, *inter alia:*

> Due to the lack of proof of M/WBE certification . . . and the fact that they [the City] presently do not show an application pending from Mr. Bones BBQ nor do they show Mr. Bones BBQ as ever being certified as a Minority/Women-Owned Business Enterprise, we cannot continue this business relationship.
>
> Our commitment to the City of Austin, is to do our best to maintain a 25% concession percentage with certified minority/women-owned business enterprises. In order for your partnership to be included in our percentage you must be

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[1] The Court of Appeals' opinion erroneously refers to the contract as entered into in 1996. (App. 2) Goode contracted with Fine Host in the summer of 1995. (App. 9) Fine Host terminated Goode's contract in August 1996. (App. 10-11)

> certified M/WBE with the City of Austin, Department of Small and Minority Business Resources. (App. 11)

Shortly after terminating Goode's contract, Fine Host wrote a memo advising the City that

> . . . I just sent to John Goode [a letter] in reference to terminating our contract as using him as a minority partner. The main reason I did this was that he was not certified as an MBE/WBE as promised to us originally nor is he planning to be. Since we do not receive credit without this certification I am ending our relationship.

Fine Host claimed that its "decision had nothing whatsoever to do with Mr. Goode's race. The same decision would have been made had the owner of Mr. Bones Barbeque been white, Hispanic, Asian-American, American-Indian or any other race or national origin." The City also claimed that it "did not request or require Fine Host to terminate its contract with John Goode, [and] [n]o city policy or contract required Fine Host to terminate that contract."

After it terminated Goode, Fine Host looked for a replacement only from the City list of certified M/WBE contractors, and hired a certified African American M/WBE. When the district court entered judgment, Fine Host did not subcontract with any barbeque vendors but instead operated its own concessions at City-owned venues.

C. Proceedings Below

Goode's complaint sought damages and injunctive relief for violation of 42 U.S.C. § 1983 against the City and § 1981 against Fine Host. On cross motions for final summary judgment, the district court held that Goode had not been injured in fact (App. 13-19) and therefore lacked standing to sue Fine Host for terminating his contract because he was not a City certified M/WBE (App. 18-19) and the City for the racial preferences in the City's ordinance. (App. 13-15) The district court also concluded that any burden the City's certification process imposed on Goode to become certified was *de minimis*, and thus insufficient to confer standing to challenge the city ordinance. (App. 15-18)

In an unpublished opinion, the court of appeals did not address separately Goode's standing to sue Fine Host for violation of § 1981 when it terminated his contract. Instead the court treated the § 1981 and § 1983 claims as synonymous for standing purposes, stating, "Goode brought this 42 U.S.C. §§ 1981 and 1983 suit against the City of Austin and Fine Host alleging that he was the victim of intentional racial discrimination when Fine Host terminated his contract." (App. 3) Thereafter, however the court of appeals only addressed the standing issue as if Goode's only complaint were about the administrative burden of becoming certified:

> Goode argues that he was injured because he could not take advantage of Austin's M/WBE preferences without submitting to allegedly intrusive certification procedure. He does not dispute the defendants' contention that he was free to compete for vending contracts on an

> equal, race-neutral basis with all other non-certified businesses. Further, he does not attack racial preferences, but complains that the defendants' system did not afford such preferential treatment completely devoid of administrative burden on the beneficiaries.[2] (App. 4)

Relying on *United States v. Hays*, 515 U.S. 737, 734-44 (1995), the court of appeals concluded that Goode had no standing, for § 1983, "[b]ecause the 'intentionally discriminatory race and gender conscious goals' of which Goode complains benefitted rather than injured him . . . " (App. 4-5) The court of appeals did not specifically address Goode's standing for § 1981, as the opinion concludes: "We AFFIRM the district court's dismissal of Goode's § 1983 action." (App. 5) The court of appeals denied Goode's petition for rehearing pointing out, *inter alia*, this omission. (App. 27)

1. Standing For Fine Host's Termination of Goode's Contract under § 1981

The district court held:

> The plaintiff also lacks standing to sue Fine Host for racial discrimination under section 1981 because he has suffered no injury in fact . . . Fine Host would never have subcontracted out its barbeque business to Mr. Bones without the City's twenty-five percent goal for participation by *certified* M/WBEs. Fine Host terminated its

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[2] This erroneously states Goode's claims both as reflected in the district court's opinion and in Goode's briefs and petition for rehearing in the court of appeals.

> contract with Mr. Bones due to Goode's voluntary decision not to seek certification, not because of Goode's race. [record citations omitted] Goode offered no summary judgment evidence to rebut Fine Host's evidence that it would not have subcontracted with Goode's [sic] in the absence of the City's affirmative action program. Therefore, Goode has not suffered any injury in fact due to Fine Host's participation in the City's affirmative action program, including its certification requirement. Moreover, even assuming Goode had standing against Fine Host on a racial discrimination claim, he has failed to allege a prima facie case of discrimination; it is undisputed Goode was replaced by another MBE owned by an African American. (App. 18-19)

As stated above, the court of appeals agreed.

2. Standing For Goode's § 1983 claim against the City

The district court held that Goode "has alleged no injury in fact sufficient to confer standing due to the benefits the City's affirmative action plan offers him as a minority." (App. 15) The district court further concluded that the burden of the certification procedure constituted no injury because it was *de minimis* (App. 15-18), and the burden of certification is "not properly attributed to the City; instead, the contractors may impose the burden, which is not a direct and necessary result of the City's policy." (App. 18)

Again, the court of appeals affirmed the district court without differentiating between § 1981 and § 1983, holding that Goode had no standing "[b]ecause the 'intentionally discriminatory race and gender conscious goals' of which Goode complains benefitted rather than injured him . . . " (App. 4-5)

REASONS FOR GRANTING THE PETITION

I. The Decisions Below Conflict With The Decisions Of The District Of Columbia Circuit And The Ninth Circuit Courts Of Appeals

In *Dynalantic Corp. v. Dept. of Defense*, 115 F.3d 1012 (D.C. Cir. 1997), Dynalantic challenged the award of a Navy flight simulator contract through the 8(a) set-aside program which allowed only qualified businesses (at least 51% owned by individuals "socially and economically disadvantaged,") which Dynalantic was not, to bid. When the Navy withdrew the contract from the 8(a) program ostensibly because of delays due to the litigation, the court of appeals allowed Dynalantic to amend its pleadings to challenge the 8(a) program in general. *Id.* at 1015. The court rejected the government's argument that Dynalantic lacked standing because it had never sought an 8(a) contract and could not qualify for one even with the race-conscious elements eliminated (Dynalantic was not "economically disadvantaged"), because "Dynalantic's injury is its lack of opportunity to compete for Defense Department contracts reserved to 8(a) firms." *Id.* at 1016. Thus, the District of Columbia Circuit has held that whether the challenger can or cannot qualify under

the race-conscious program is not determinative of whether he has standing. Rather standing exists whenever a potential bidder is unable to compete on an equal basis.

The District of Columbia Circuit's holding in *Dynalantic* is consistent with this Court's decisions in *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (hereinafter *NE Fla Chapter of Assoc. Gen. Contractors*); and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (hereinafter *Adarand*).

In *Monterey Mechanical Co. v. Wilson*, 125 F.3d 703 (9th Cir. 1997), a California statute required general contractors to subcontract certain percentages of work to minority, women, and disabled veteran owned subcontractors or demonstrate good faith efforts to do so. The Ninth Circuit held, citing this Court's decision in *Adarand*, that the expense and time necessary for a contractor to demonstrate good faith efforts, whether "a few hundred or a few thousand dollars", was sufficient injury in fact for standing because " . . . there is no *de minimis* exception to the Equal Protection Clause. Race discrimination is never a 'trifle.' " *Id.* at 712. Both the district court and the court of appeals held that the burden on Goode of complying with the City's certification process was *de minimis*, and insufficient to confer standing. Thus, in the Fifth Circuit, some racial discriminations are a trifle.

The Ninth Circuit also held that "the burden of bidding in a discriminatory context established by statute" was injury in fact sufficient to confer standing under *NE*

Fla. Chapter of Assoc. Gen. Contractors. The Ninth Circuit also held: "Even if a general contractor suffers no discrimination itself, it is hurt by a law requiring it to discriminate, or try to discriminate, against others on the basis of their ethnicity or sex." *Monterey Mechanical Co. v. Wilson,* 125 F.3d at 707.

The City required Fine Host to at least try to discriminate on the basis of ethnicity or sex. And, Fine Host did so. Fine Host's racial discrimination in terminating Goode's contract provides standing for both Goode's § 1981 claim against Fine Host and his § 1983 claim against the City. As this court has held, discrimination in favor of a racial group, i.e. certified M/WBEs, regardless of the race of the person unable to compete on an equal basis, is as unconstitutional as discrimination against a racial group. *Adarand,* 515 U.S. at 224, 115 S.Ct. at 2111, 132 L.Ed.2d at 180.

Given this Court's decisions in *NE Fla Chapter of Assoc. Gen. Contractors; Adarand;* and *The City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), the conflict in the decisions below ought not be allowed to metastasize. Minorities who refuse to be seduced by the lure of government mandated racial preferences, and who government therefore classifies and treats as white, are as much injured in fact by racial preferences as are whites who can never qualify for preferential treatment. *Accord Staub v. City of Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1957), quoting *Jones v. City of Opelika,* 316 U.S. 584, 602, 62 S.Ct. 1231, 1242, 86 L.Ed. 1691, dissenting opinion adopted per curiam on rehearing, 319 U.S. 103, 104, 63 S.Ct. 890, 87 L.Ed. 1290: "The Constitution can hardly be thought to deny to one

subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands."

II. The Decisions Below Were Erroneous

In § 1981, Congress created a statutory remedy for the termination of a private contract for racially discriminatory reasons. Interestingly, the statute provides, in relevant part:

> (a) All persons . . . shall have the same right . . . to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens*, . . . (emphasis added)

Goode had a contract that Fine Host terminated in order to intentionally discriminate in favor of a certified M/WBE. These admitted facts alone should be sufficient to confer standing under § 1981, and to impose liability for that matter. Goode's standing does not turn on whether he wins on the merits.[3] *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343, 344 (1975). *Compare Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

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[3] Goode raised in the court of appeal the district court's denial of his motion for summary judgment against Fine Host for violation of § 1981. The court of appeals held, however, that it lacked jurisdiction to review that decision because Goode's *pro se* notice of appeal stated that Goode appealed "the decision of the trial court to dismiss his claims[.]" (App. 3)

Surely if Goode were white, and thus uncertified and uncertifiable, he would have a cause of action under § 1983 against the City and § 1981 against Fine Host for terminating his contract in order to discriminate on the basis of race in favor of a City certified M/WBE. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). *Accord, Adarand; NE Fla Chapter of Assoc. Gen. Contractors.* Likewise, had Fine Host terminated Goode's contract to hire a white subcontractor, Goode would have standing and a strong cause of action.

Both the district court and court of appeals' decisions rest on the erroneous premise that if Goode was injured, he caused his own injury by refusing to submit to the certification procedure and accept preferential treatment, not the City by mandating racial preferences which the certification procedure was one means of implementing. Quite simply, if the City had not imposed racial preferences, Goode and every other barbeque vendor, black, white or otherwise, could have competed on an equal basis for the Fine Host subcontract instead of in a "discriminatory context." Fine Host may have decided to contract with no one, as it claimed, and it would not thereby have discriminated for or against anyone. But, the City ordinance required Fine Host to discriminate on the basis of race, i.e., for certified M/WBEs, and Fine Host terminated Goode's contract to effect the City's racial preferences.

Both the district court and the court of appeals also erred in holding that Goode was not injured because Fine Host would not have contracted with him initially except for the City's participation goals and its belief that he was

certified. The City did have participation goals. Thus, Goode had to bid in a "discriminatory context" in spite of having provided the same services to Volume Services for several years before without being certified as a M/WBE. And, Fine Host terminated Goode's contract because of that "discriminatory context." By Fine Host's own admission it would have refused to even consider Goode for a contract had it known he was not certified. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). In other words, Fine Host defends its intentional racial discrimination in terminating Goode's contract with its intentional racial discrimination in making the contract. If two wrongs do not make a right, how can one?

The District court erroneously applied this court's decision in *NE Fla Chapter of Assoc. Gen. Contractors* when it paraphrased this court's holding on standing as, " . . . the plaintiff must show he was disadvantaged by not being allowed to compete on an equal footing with other contractors *because of his race.*" (Emphasis added) Actually, this court held:

> . . . When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not

> the ultimate inability to obtain the benefit. [citation omitted] . . . To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis. [footnote omitted]

113 S.Ct. at 2303, 124 L.Ed.2d at 666.

Moreover, in *Adarand*, this court went further to emphasize that the race of the complaining party is not the critical factor:

> . . . any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny.

Adarand, 515 U.S. at 224, 115 S.Ct. at 2111, 132 L.Ed.2d at 180.

The district court viewed Goode's ability to compete with all non-certified subcontractors on an equal footing as sufficient, ignoring that he could not, like any white male subcontractor, compete on an equal footing with certified M/WBEs. (App. 13-15) The court of appeals fell into the same error. (App. 4-5)

Under the rule announced below, minorities who decline to become certified under affirmative action plans are caught in a constitutional Catch 22. If they become certified, they have no standing to complain because they have been "benefitted" not injured since they can compete on an equal or better footing with all other contractors. If they refuse to become certified, they have no standing because they could obtain the benefits if they

would just apply. Such a holding would effectively mandate that minorities accept the stigma of inferiority the Justices of this court have cautioned against. *See e.g., The City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526-527, 109 S.Ct. 736 (SCALIA, J. dissenting); *Adarand*, 515 U.S. at 240, 115 S.Ct. at 2119 (THOMAS, J. concurring).

III. The Questions Presented Are Important

Racial divisions have been a plague on our country since its inception. President Clinton and other national politicians have argued recently that these divisions are one of the greatest challenges facing America. These divisions are not only in electoral politics, but in the federal courts as evidenced by the difficult development of the law in this Court on affirmative action plans challenged under the Fourteenth Amendment's equal protection of the law, the Civil War Amendment, intended to make all races equal at least before the law. *See e.g., Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *The City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990); *Adarand*. While this case will not resolve all of the remaining issues, it presents the question of whether the federal courts will be open to minorities to vindicate their rights to equal protection when they refuse to accept preferential treatment.

CONCLUSION

The Petition for Writ of Certiorari should be granted on each of the questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-50152
Summary Calendar

JOHN GOODE, doing business as Mr Bones BBQ

Plaintiff – Counter Defendant – Appellant

v.

CITY OF AUSTIN, TX;

Defendant – Counter Claimant – Appellee

FINE HOST CORP

Defendant – Appellee

Appeal from the United States District Court
For the Western District of Texas, Austin Division

(A-98-CV-144-SS)

(Filed Nov. 10, 1999)

Before SMITH, BARKSDALE and PARKER, Circuit Judges.

PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiff John Goode appeals the grant of summary judgment in favor of defendants. We affirm.

PROCEDURAL HISTORY AND FACTS

Between 1987 and the present, the City of Austin has enacted a series of ordinances designed to alleviate discrimination against women and minorities in the award of city contracts for goods and services. The current ordinance, passed in 1996, provides incentives for city contractors to subcontract with business enterprises owned by women and minorities ("M/WBE"). The City employs a certification process that focuses on ownership of the business to determine M/WBE status.

In 1992, Fine Host Corporation contracted with the City to provide food services at city venues. Fine Host was obligated under the contract to make good faith efforts to provide subcontracting opportunities to food service providers certified as minority owned businesses.

In 1996, Fine Host subcontracted with Goode, the African-American owner of Mr. Bones Barbeque, understanding that he had certified Mr. Bones Barbeque as a M/WBE. Although Mr. Bones had been certified as an M/WBE in 1992-93, he chose not to renew the certification after it expired in 1993. He explained that he had privacy concerns and did not want to continue to reveal personal and financial information as was required by the certification process. In August 1996, after Goode refused to obtain a current M/WBE certification, Fine Host terminated its contract with Goode and replaced him with another African-American owned barbeque vendor.

Goode brought this 42 U.S.C. §§ 1981 and 1983 suit against the City of Austin and Fine Host alleging that he was the victim of intentional racial discrimination when Fine Host terminated his contract. Goode also asserted breach of contract claims against Austin and Fine Host. All parties filed motions for summary judgment. The district court granted summary judgment for defendants on the merits of the breach of contract claims. The district court dismissed Goode's racial discrimination claims, finding that Goode had suffered no injury-in-fact and accordingly lacked standing. Finally, the district court denied Goode's cross motion for summary judgment without discussion.

JURISDICTION

Goode filed a *pro se* notice of appeal, stating only that he was appealing "the decision of the trial court to dismiss his claims[.]" However, Goode's brief alleges that the district court erred in denying his motion for partial summary judgment on liability. Generally, a notice of appeal "shall designate the judgment, order or part thereof being appealed." FED. R. APP. P. 3(c)(1)(B) (1994). Because Goode did not apprise this court in his Notice of Appeal that the intended to appeal the district court's denial of his motion for partial summary judgment, we do not have jurisdiction to review that decision. *See C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981). Our jurisdiction is therefore limited to Goode's challenge to the district court's dismissal of his discrimination claims.

STANDING

Federal courts have jurisdiction to adjudicate only actual cases or controversies. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). The standing doctrine requires that a plaintiff have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" *Baker v. Carr*, 369 U.S. 186, 204 (1962). Ideological opposition to a government program is insufficient to confer standing. *See Valley Forge*, 454 U.S. at 473.

Goode argues that he was injured because he could not take advantage of Austin's M/WBE preferences without submitting to allegedly intrusive certification procedure. He does not dispute the defendants' contention that he was free to compete for vending contracts on an equal, race-neutral basis with all other non-certified businesses. Further, he does not attack racial preferences, but complains that the defendants' system did not afford such preferential treatment completely devoid of administrative burden on the beneficiaries.

When a "governmental actor is discriminating on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *United States v. Hays*, 515 U.S. 737, 734-44 (1995) (quotations omitted). Because the "intentionally discriminatory race and gender conscious goals" of which Goode

complains benefitted rather than injured him, we conclude that Goode lacks standing to attack their constitutionally.

Based on the foregoing, we AFFIRM the district court's dismissal of Goode's § 1983 action.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOHN GOODE d/b/a MR. BONES BBQ,	§	
Plaintiff	§	
vs.	§	**NO. A 98 CA 144 SS**
CITY OF AUSTIN, TEXAS, and FINE HOST CORP.,	§	
Defendants	§	

ORDER

(Filed Dec. 14, 1998)

BE IT REMEMBERED that on the 14th day of December 1998, the Court reviewed the file in the above-styled cause and specifically the cross motions for summary judgment.[1] After consideration of the motions, the briefs,

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[1] The motions and cross motions for summary judgment are Defendant City of Austin's Motion for Summary Judgment [#28], Plaintiff John Goode's Response to the City's Motion for Summary Judgment [#32-1]. Defendant City of Austin, Texas' Reply to Plaintiff John Goode d/b/a Mr. Bones BBQ's Response to the City's Motion for Summary Judgment [#34], Plaintiff John Goode's Counter-Reply to City of Austin's Reply to Goode's Response to City of Austin's Motion for Summary Judgment [#35], and the City of Austin's letter brief in reply thereto [#42]; Fine Host Corporation's Motion for Summary Judgment [#40], Plaintiff John Goode's Response to Fine Host Corporation's Motion for Summary Judgment [#43]; Plaintiff John Goode's Cross Motion for Partial Summary Judgment on Liability Against Defendant City of Austin, Texas [#32-2], Defendant City of Austin, Texas' Response to Plaintiff John Goode d/b/a

the accompanying evidence, and the applicable law, the Court enters the following opinion and orders granting summary judgment to defendants Fine Host Corporation and the City of Austin.

I. Background

On February 19, 1987, the Mayor of Austin signed into law City Council Ordinance No. 87-0219-Q, which sets goals for participation of minorities and women in City contracts.[2] In 1992, the City commissioned a study by D.J. Miller and Associates, which was submitted September 28, 1993 and found that discrimination existed in the areas in which the City contracted for goods and services. As a result, the City Council conducted numerous hearings and studies and in 1996 passed Ordinances Nos. 96-0321-H and 96-0411-H, which amended the 1987 ordinance and are currently codified as Chapter 5-7 of the City Ordinances, AUSTIN, TEX., ORDINANCES ch.

Mr. Bones BBQ's Cross Motion for Summary Judgment on Liability Against Defendant City of Austin, Texas [#37], Plaintiff John Goode's Reply to the City's Response to Goode's Motion for Partial Summary Judgment on Liability Against the City [#41]; Plaintiff John Goode's Motion for Partial Summary Judgment on Liability Against Fine Host Corporation [#39], and Fine Host Corporation's Response to Plaintiff John Goode's Motion for Partial Summary Judgment on Liability Against Fine Host Corporation [#44].

[2] A copy of the original ordinance can be found at Appendix to Plaintiff John Goode's Response to City of Austin's Motion for Summary Judgment and Goode's Cross Motion for Summary Judgment on Liability Against the City of Austin [#32], Tab C.

5-7.[3] The current ordinance is complex in its attempts to balance the interest of equal opportunity and encouraging participation of minorities and women, and it will be described briefly for purposes of this order. The ordinance provides incentives for City contractors to gain participation of minority-owned business enterprises ("MBEs") and women-owned business enterprises (WBEs") (collectively "M/WBEs"). M/WBE status is determined by a certification process that focuses on ownership of the business. *Id.* § 5-7-4. (defining MBEs and WBEs). For each contract with the City, goals and subgoals are set for participation of M/WBEs. *Id.* § 5-7-20. Before, during, and after the bidding procedure, the City monitors compliance with the participation goals. *Id.* §§ 5-7-22, 23. A contractor who fails to comply with the goals may be barred from City contracts for up to five years, assessed monetary fines, or sued for breach of contract. *Id.* § 5-7-26. However, the contractor may avoid these penalties if it exhibits enumerated "good faith efforts" to recruit M/WBEs. *Id.* § 5-7-22(E).

The plaintiff John Goode is the sole shareholder in a corporation called "Mr. Bones Barbeque." Prior to 1996, when Mr. Bones was incorporated, Goode was its sole proprietor. Goode sold barbeque at two restaurants and at City events pursuant to subcontracts with City concessions contractors. Beginning in 1989, Mr. Bones provided

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[3] A copy of the current codification of the ordinance can be found at Appendix to Plaintiff John Goode's Response to City of Austin's Motion for Summary Judgment and Goode's Cross Motion for Summary Judgment on Liability Against the City of Austin [#32], Tab D.

barbeque food concessions for City of Austin venues under a subcontract with the City's general concessions contractor, Volume Services, Inc. Mr. Bones later entered into a subcontract agreement with a new City contractor, Fine Host Corporation. In the summer of 1995, Fine Host entered into a subcontract for Mr. Bones to provide barbeque to Fine Host pursuant to the City contract. The subcontract was to end "upon 30 day written notice by either Fine Host Corporation or the subcontractor, explanation not necessary." Subcontract, at 1.[4] However, under the subcontract, "Fine Host does not guarantee any minimum level of the use of the Subcontractor's services at the Center during the term" of the contract. *Id.* The subcontract requires Goode to provide Fine Host with a certificate of insurance meeting certain specifications of coverage. *Id.* At 2. The subcontract does not say anything regarding health permits or minority-owned business certification. *Id.*

Pursuant to its contract with the City and in compliance with City ordinance, *see* AUSTIN, TEX., ORDINANCES ch. 5-7,[5] Fine Host received certain benefits and avoided certain penalties by subcontracting a given percentage of

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[4] The subcontract can be found at the Appendix to Plaintiff John Goode's Response to City of Austin's Motion for Summary Judgment and Goode's Cross Motion for Summary Judgment on Liability Against the City of Austin [#32], Tab F, or at the Appendix to Defendant City of Austin's Motion for Summary Judgment [#28], Tab A (Exh.1).

[5] A copy of the subcontract can be found at the Appendix to Plaintiff John Goode's Response to City of Austin's Motion for Summary Judgment and Goode's Cross Motion for Summary Judgment on Liability Against the City of Austin [#32], Tab. D.

its concession services to M/WBEs. Specifically, Fine Host's 1992 contract with the City included a goal of twenty-five percent participation by certified M/WBEs. Fine Host concedes that it originally decided to subcontract with Mr. Bones because it understood Mr. Bones to be an M/WBE, and Fine Host asserts it would not have contracted out its barbeque services but for its interest in meeting the twenty-five percent goals for certified M/WBEs in the City contract. *See* Affidavit of Todd M. Avila, at 2 (Appendix to Defendant City of Austin's Motion for Summary Judgment [#28], Tab A).

On May 8, 1992, while still subcontracting for Volume Services, Inc., Mr. Bones received certification from the City as an MBE, effective until May 1, 1993. *See* Appendix to Defendant City of Austin's Motion for Summary Judgment [#28], Tab B. Goode asserts he chose not to renew his certification after it expired in 1993 because he had privacy concerns and did not want to continue to reveal personal and financial information. Affidavit of John Goode, at 1.[6] Goode asserts he never explicitly represented to Fine Host that Mr. Bones was a certified MBE. After the subcontract was entered into in 1996, Fine Host requested (and later demanded) that Goode obtain his MBE certification from the City. Goode refused, and Fine Host notified Goode by a letter dated August 2, 1996 that

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[6] Goode's affidavit can be found at the Appendix to Plaintiff John Goode's Response to City of Austin's Motion for Summary Judgment and Goode's Cross Motion for Summary Judgment on Liability Against the City of Austin [#32]. Tab A.

its subcontract with Mr. Bones was terminated.[7] The letter stated,

> Our commitment to the City of Austin, is to do our best to maintain a 25% concession percentage with certified minority/women owned business enterprises. In order for your partnership to be included in our percentage you must be a certified M/WBE with the City of Austin Department of Small and Minority Business Resources.

Letter of August 2, 1996.

Mr. Bones subsequently went out of business. After terminating its subcontract with Mr. Bones, Fine Host entered into a subcontract with a different minority-owned barbeque vendor that had valid certification as a minority-owned business. Currently, Fine Host does not subcontract with any barbeque vendors and instead operates its own barbeque concessions at City-owned venues.

II. Analysis

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law," Rule 56(e) states that "[w]hen a motion for summary judgment

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[7] This letter is attached as Tab B of the Appendix to Plaintiff John Goode's Response to City of Austin's Motion for Summary Judgment and Goode's Cross Motion for Summary Judgment on Liability Against the City of Austin [#32].

is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing there is a genuine issue for trial."

The Court must substantively evaluate the evidence offered by the party who filed the motion for summary judgment (the "moving party") and the party who opposes the motion (the "nonmoving party") to determine whether the evidence raises a "material" fact question which is "genuine." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). If genuine issues of material fact exist, the motion must be denied. The Court can consider as controverting summary judgment evidence any facts admitted by party in a sworn complaint or in other sworn pleadings. *See Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 107-08 (5th Cir. 1987). Both the movant and the nonmovant bear burdens of producing evidence in the summary judgment process. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). The nonmoving party is not entitled to rest on its pleadings alone, but must carry the burden of providing evidence of a genuine issue of material fact. *King v. Chide*, 974 F.2d 653, 656 (5th Cir. 1992).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the nonmoving party and indulge all reasonable inferences in favor of that party. *International Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991). The Fifth Circuit has concluded that "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v.*

Sadler, 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986)). However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the nonmovant's burden." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (1996).

A. Standing to Sue the City

Standing is a jurisdictional issue arising from Article III's requirement that federal courts only adjudicate an actual "case or controversy." *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S. Ct. 752, 757 (1982). The primary concern behind the standing doctrine is to ensure the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 82 S. Ct. 691, 703 (1962). In this case, the plaintiff must show he was disadvantaged by not being allowed to compete on an equal footing with other contractors because of his race. *See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 113 S. Ct. 2297, 2303 (1993).

The City argues the plaintiff has no standing because he has suffered no injury in fact and instead was in a better position due to the City's policy. The City argues the plaintiff voluntarily refused to benefit from the affirmative action program, and even without the affirmative action program, the plaintiff still had the ability to compete on equal footing with all subcontractors competing

without the benefit of the program. Moreover, the City and Fine Host argue the plaintiff would never have been offered a subcontract in the first place if it were not for the twenty-five percent goal for participation of M/WBEs in the City's contract with Fine Host.

The plaintiff asserts he opposes the City's affirmative action program for ideological reasons.[8] The plaintiff argues that preventing him from challenging Austin's affirmative action program is analogous to preventing Rosa Parks from challenging the segregated seating arrangements on Birmingham's buses in the 1950s. The plaintiff offers a useful analogy, but he misapplies it. The correct analogy is that a white bus rider on the Birmingham buses would not be able to challenge the segregated seating arrangements because he would not suffer an injury in fact sufficient to confer standing. Only individuals who are "personally denied equal treatment" by alleged discriminatory conduct by the government have standing to sue. *United States v. Hays*, 115 S. Ct. 2431, 2435 (1995); *Allen v. Wright*, 104 S. Ct., 3315, 3326 (1984); *Heckler v. Matthews*, 104 S. Ct. 1387, 1395 (1984). Ideological opposition to a government program is insufficient to confer standing. *Valley Forge*, 102 S. Ct. at 758-59.

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[8] *See* Plaintiff's First Amended Complaint [#13], at 7 ("Plaintiff desired no special treatment on account of race or ethnicity. Plaintiff desired to be evaluated on his willingness, qualifications, and abilities."); Plaintiff John Goode's Response to Fine Host Corporation's Motion for Summary Judgment [#43], at 3 ("In short, Goode was penalized for yearning to continue his contract based on merit and for not taking part in a process judging him solely on racial criteria.").

The defendants are therefore correct in arguing that the plaintiff has alleged no injury in fact sufficient to confer standing due to the benefits the City's affirmative action plan offers him as a minority. The plaintiff also argues, however, that the City's policy injured him by subjecting him to the certification procedure requiring him too register as an MBE.[9] However, the plaintiff has offered no summary judgment evidence of how that certification procedure actually injures him. He asserts in a conclusory fashion that the certification "burdens" him and requires him to reveal "private" information, including "financial" information. *See* Plaintiff John Goode's Response to City of Austin's Motion for Summary Judgment and Goode's Cross Motion for Summary Judgment on Liability Against the City of Austin [#32], at 4.[10]

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[9] Additionally, the plaintiff makes the preposterous argument that "[c]ertification is of no understandable benefit to the M/WBE." Certification is necessary to verify that the City's affirmative action program encourages contractors to include bona fide M/WBEs in their projects. Without this process, there would be no way to verify that contractors actually deal with M/WBEs in satisfying the target goals.

[10] *See also* Plaintiff John Goode's Response to the City's Response to the City's Motion for Summary Judgment and Cross Motion for Partial Summary Judgment on Liability Against Defendant City of Austin, Texas [#32], at 6-7 ("Goode was mandated to reveal personal and financial information about his business not required of white male contractors."); November 2, 1998, Affidavit of John Goode (Plaintiff John Goode's Response to Fine Host Corporation's Motion for Summary Judgment [#43], Exh. B) ("I chose not to participate in certification [after 1992] because I did not want to continue to reveal personal data and financial information. I had concerns for my privacy.").

However, the plaintiff has offered no evidence of specifically what "private" or "financial" information it must reveal under the City's policy.[11] The only general reference by Goode to what these burdens entail is contained in his citations to the ordinance, Sections 5-7-4 and 5-7-16. Upon full review of the ordinance the only requirements enumerated are that M/WBEs "must be certified," and "[a]pplications for certification shall be on standard forms." AUSTIN, TEX, ORDINANCES, § 5-7-16(B),(D). Furthermore, reading the plaintiff's assertions in the light most favorable to the plaintiff, the Court can infer that the requirements of Section 5-7-4 may require other information: that over 50% of ownership is held by minorities, that management is carried out by minorities, the size of the business, and the length of time the business has operated within the state of Texas. The most enlightening evidence before the Court on what specific information was solicited for Mr. Bones's certification was offered by the City in the City's letter to Goode informing him that his 1992 application for certification of Mr. Bones as an MBE was granted. *See* Letter of May 8, 1992 (Appendix B to Defendant City of Austin's Motion for Summary Judgment [#28]). The letter states, "[d]uring the certification period, you must promptly report to us any change to your legal or operational structure, telephone number, or address." *Id.* These basic pieces of information about a business cannot be difficult for a business to compile, and

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[11] The magazine articles submitted by the plaintiff as an exhibit has no probative value, as it is merely hearsay and is irrelevant because it does not discuss the Austin policy at all. *See* Martha I. Finney, *That's Funny – You Don't Look like a DBE*, AIRPORT MAGAZINE (Nov.-Dec. 1994).

the information does not appear to be invasive or to tread on the privacy of a business that would thrive off of dissemination of information about it – a restaurant. The plaintiff has not offered any information of how the certification process was a burden to him, and he has not identified one piece of information that was "private" which he was required to reveal. Therefore, even taking the evidence before the Court in the light most favorable to the plaintiff, the requirement of reporting this information for the benefit of certification is nothing more than a de minimis burden and does not constitute an injury in fact for purposes of standing.[12]

Even if the plaintiff could offer evidence of how the certification requirements burdened him, he draws only a tenuous connection between the City's policy and that burden. As the City points out, it does not require MBEs to receive certification and thereby become eligible for preferences from City contractors. Instead, an MBE is free to forego certification and compete with all other "non-preferred" contractors and subcontractors. The Court understands the plaintiff's argument to be that the City's affirmative action policy could encourage contractors with the City to require certification of all subcontracting M/WBEs, regardless of whether the M/WBEs wish to be involved in the affirmative action program. The City

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[12] In fact, the real burden of certification, and the affirmative action program in City contracts as a whole, falls upon the City in verifying certification information is true, providing directories of M/WBEs, and monitoring contractors' compliance with the program.

concedes its program encourages City concessions contractors to hire at least a minimal percentage of certified minority-owned businesses. Contractors are likely to want those contracts to go to highly qualified minority-owned businesses, and they could therefore require qualified M/WBEs to fulfill the bureaucratic requirements of certification – otherwise, M/WBEs that could effectively receive subcontracts without certification would receive non-affirmative-action subcontracts, and contractors would be forced to fill the certified M/WBE subcontracts only to M/WBEs that could not receive subcontracts without affirmative action. In short, the City's policy could indirectly encourage contractors to require certification of M/WBEs that do not need affirmative action to receive subcontracts because contractors are encouraged to force such businesses to fulfill the classification requirements, thereby causing M/WBEs to be treated differently due to their race or gender.

The Court concludes this alleged certification burden could not properly be attributed to the City; instead, the contractors may impose the burden, which is not a direct and necessary result of the City's policy. Nevertheless, even assuming arguendo that this tenuous burden can effectively be linked to the City's affirmative action policy by the plaintiff, the asserted burden of acquiring M/WBE certification is de minimis and does not constitute a "barrier" that confers a substantial injury for purposes of constitutional standing.

The plaintiff also lacks standing to sue Fine Host for racial discrimination under section 1981 because he has suffered no injury in fact. The undisputed evidence is that Fine Host would never have subcontracted out its

barbeque business to Mr. Bones without the City's twenty-five percent goal for participation by *certified* M/WBEs. Fine Host terminated its contract with Mr. Bones due to Goode's voluntary decision not to seek certification, not because of Goode's race. Deposition of Todd Avila, at 167-168 (Fine Host Corporation's Motion for Summary Judgment [#40], App. 3). Goode has offered no summary judgment evidence to rebut Fine Host's evidence that it would not have subcontracted with Goode's in the absence of the City's affirmative action program. Therefore Goode has not suffered any injury in fact due to Fine Host's participation in the City's affirmative action program, including its certification requirement. Moreover, even assuming Goode had standing against Fine Host on a racial discrimination claim, he has failed to allege a prima facie case of discrimination; it is undisputed Goode was replaced by another MBE owned by an African American.

B. Breach of Contract

It is clear the plaintiff has no contractual privity with the City of Austin, as required to establish contractual liability. *See Bass v. Hendrix*, 931 F. Supp. 523, 532 (S.D.Tex.1996); *Jensen Constr. Co. v. Dallas County*, 920 S.W.2d 761, 772 (Tex. App.-Dallas 1996, n.w.h.). It is equally clear the plaintiff satisfies the privity requirement with regard to Fine Host, through the written subcontract between the two parties.

The subcontract entered into between Fine Host and Mr. Bones does not require Mr. Bones to maintain current M/WBE certification, and it does not mention health

licensing or inspection of any sort. It does, however, require proof of a specified level of insurance coverage. More importantly, the subcontract provides that either party may terminate the contract for any reason upon thirty-day notice. Therefore, the plaintiff cannot complain that the contract was terminated; instead he can only complain about the lack of notice. The undisputed evidence is that Fine Host terminated its contract with Mr. Bones by letter of August 2, 1996. Fine Host asserts it gave Goode more than the thirty-day notice of his need to certify as an MBE and to comply with other requirements. That does not constitute thirty-day notice of termination, however. As a matter of law, Fine Host failed to give Goode the thirty-day notice required by the plain language of the contract. Fine Host argues Goode's noncompliance with MBE certification, health certification, and insurance documentation justified the termination of the subcontract. However, the explicit terms of the contract require thirty-day written notice, and such notice was not given.

Nevertheless, Goode has wholly failed to allege any damages he sustained due to Fine Host's failure to give thirty-day notice. The plaintiff offers no evidence of how much he would have profited from those thirty days, or even how much he profited on an average thirty days. In fact, in his deposition, Goode conceded that the lack of thirty-day notice in and of itself did not harm him to any extent beyond the harm caused to him by the termination of the contract. Goode Deposition, at 644-45 (App. 2 to Fine Host Corporation's Motion for Summary Judgment [#40]). More importantly, by the subcontract's express terms, Fine Host made no guarantee of "any minimum

level of the use of the Subcontractor's services." Subcontract, at 1. Hence, not only has the plaintiff failed to offer any evidence on this record of damages for the lack of thirty-day notice; it is unlikely the plaintiff could possibly prove any damages because Fine Host would not have been obligated to purchase anything from Mr. Bones during those thirty days.

Therefore, although Fine Host failed to comply with the literal terms of the subcontract by failing to give thirty-day notice, the plaintiff has failed to prove damages, a necessary element of a cause of action for breach of contract. *See Landrum v. Devenport*, 616 S.W.2d 359, 361 (Tex. Civ. App.-Texarkana 1981, no writ); *Bradley v. Houston State Bank*, 588 S.W. 2d 618, 624 (Tex, Civ. App.-Houston [14th Dist.] writ ref'd, n.r.e.).

In summary, the plaintiff does not have standing to assert his discrimination claims against the City and Fine Host because he suffered no injury in fact. He has no contractual claim against the City because he has no privity. His contract claim against Fine Host fails as a matter of law because the plaintiff has failed to provide evidence of any contractual breach that gives rise to damages. In accordance with the foregoing, the Court enters the following orders:

IT IS ORDERED that Defendant City of Austin's Motion for Summary Judgment [#28] is GRANTED;

IT IS FURTHER ORDERED that Plaintiff John Goode's Cross Motion for Partial Summary Judgment on Liability Against Defendant City of Austin, Texas [#32-2] is DENIED;

IT IS FURTHER ORDERED that Fine Host Corporation's Motion for Summary Judgment [#40] is GRANTED;

IT IS FURTHER ORDERED that Plaintiff John Goode's Motion for Partial Summary Judgment on Liability Against Fine Host Corporation [#39] is DENIED; and

IT IS FINALLY ORDERED that the plaintiff's Motion for Leave of Court to file an Amended List of Potential Witnesses, Testifying Experts, and Proposed Trial Exhibit [#45], the Motion to Exclude Witness Testimony [#49], and any other pending motions are DISMISSED AS MOOT.

SIGNED on this 14th day of December, 1998.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOHN GOODE d/b/a MR. BONES BBQ,	§	
Plaintiff	§	
vs.	§	**NO. A 98 CA 144 SS**
CITY OF AUSTIN, TEXAS, and FINE HOST CORP.,	§	
Defendants	§	

JUDGMENT

(Filed Dec. 14, 1998)

BE IT REMEMBERED on this the 14th day of December 1998, the Court having granted the motions for summary judgment filed by the City of Austin and Fine Host Corporation, enters the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that the plaintiff John Goode d/b/a Mr. Bones BBQ take nothing in this cause against the defendants the City of Austin and Fine Host Corporation, and that the defendants go hence with their costs, for which let execution issue against the plaintiff.

SIGNED this the 14th day of December 1998.

/s/ Sam Sparks
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOHN GOODE d/b/a MR. BONES BBQ,	§	
Plaintiff	§	
vs.	§	**NO. A 98 CA 144 SS**
CITY OF AUSTIN, TEXAS, and FINE HOST CORP.,	§	
Defendants	§	

ORDER

(Filed Jan. 7, 1999)

BE IT REMEMBERED that on the 5th day of January 1999, the Court reviewed the file in the above-styled cause and specifically the Plaintiff's Motion for Reconsideration [#58]. The Plaintiff brings forth two pieces of information for the first time in his motion for reconsideration: (1) the fact that the plaintiff was required to submit tax information and returns as part of the "financial information" required for certification as a minority-owned business ("MBD"); and (2) the Fifth Circuit's holding in *Fadeyi v. Planned Parenthood of Lubbock, Inc.* NO. 97-11310 (5th Cir. Nov. 11, 1998), that 42 U.S.C. § 1981 applies to discriminatory acts in the workplace involving "at will" employees. The *Fadeyi* holding is irrelevant to this case because the Court's dismissal of the plaintiff's claims was not based on any assumption that Section 1981 does not apply to contracts terminable at will.

The evidence that tax returns were included in the "financial information" required to be revealed to the City for certification as an MBE should have been made by the plaintiff sooner and would have at least been relevant to the Court's consideration of whether the certification process was a "de minimus"[1] burden. Nevertheless, even considering this evidence, the Court is not persuaded that its conclusion or reasoning applied in its December 14, 1998, opinion and judgment should be altered. The only evidence the plaintiff adds with his motion for reconsideration is that the plaintiff was required to submit tax information *to the City*. The evidence does not suggest this information was revealed *to the public*. On the contrary, the evidence offered by the plaintiff with his motion to reconsider states the City's law department evaluated all public requests for information, and the City did not reveal "proprietary information." Motion for Reconsideration [#58], exh. A (Cantu Deposition) at 32. According to the Internal Revenue Code, tax returns and return information are confidential, and there is no suggestion the City revealed such confidential information to anyone. 26 U.S.C. § 6103; *see also* TEX. GOV'T CODE ANN. § 552.101 (stating that under Texas

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[1] The Court reconsiders its spelling of "de minimis" as applied in its previous order, which was based on reference to BLACK'S LAW DICTIONARY 224 (5th ed. 1983). After noting the spelling as "de minimus" in the plaintiff's motion, the Court discovered the Fifth Circuit has used the term "de minimus" 347 times and "de minimis" 290, and the Supreme Court concurs with the Circuit's spelling by a narrow 215 to 210 majority. The Court therefore defers to the plaintiff, the Circuit, and its own sense of aesthetics (or is it "esthetics"), and uses "de minimus" in spite of BLACK'S.

open records law, information that is confidential by law is not public information). Therefore, the additional evidence offered by the plaintiff on reconsideration verifies that no significant intrusion was made on the plaintiff's privacy interests by the certification process because it reveals the City implemented a system to prevent the disclosure of confidential (or "proprietary") information to the public.

Furthermore, as explained in the Court's December 14, 1998 order, even if the Plaintiff were correct that his burden was greater than de minimus, the plaintiff's claims would still fail entirely.

Therefore, the Court enters the following order:

IT IS ORDERED that the Plaintiff's Motion for Reconsideration [#58] is DENIED.

SIGNED on the this 5th day of January, 1999.

/s/ Sam Sparks
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50152

JOHN GOODE, doing business as Mr. Bones BBQ

Plaintiff - Counter Defendant - Appellant

v.

CITY OF AUSTIN, TX;

Defendant - Counter Claimant - Appellee

FINE HOST CORP

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING

(Filed Dec. 17, 1999)

Before SMITH, BARKSDALE and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

CHAPTER 5-7: MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM

Section

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* * *

§ 5-7-4 DEFINITIONS.

For the purpose of this chapter the following definitions shall apply. With the exception of specifically defined terms set forth herein, all words shall have their ordinary and usual meanings. In the event of conflict, the specific definition set out herein shall presumptively, but not conclusively, prevail over the ordinary and usual meanings.

ANNUAL PARTICIPATION GOALS. The targeted levels established by the City Council for the annual aggregate participation of MBEs and WBEs in City Contracts in the Procurement Categories or market segments to which this chapter applies.

BUSINESS ENTERPRISE or FIRM. A corporation, partnership, sole proprietorship, joint venture, joint stock company, professional association or any other legal entity, that is properly licensed and/or otherwise authorized to do business in the State of Texas.

* * *

COMPLIANCE PLAN. The plan submitted with the bid or proposal detailing the bidder/proposer's achievement of the goals or subgoals or its good faith efforts to

meet the goals or subgoals for all elements of the solicitation, as defined in § 5-7-22.

* * *

DBE or DISADVANTAGED BUSINESS ENTERPRISE. Defined as provided in 49 CFR 23.62 or other applicable federal regulations. MBEs and WBEs certified by the city will be considered DBEs for federally funded projects.

* * *

GOOD FAITH EFFORTS. The action undertaken by a bidder or proposer to obtain MBE/WBE participation for subcontracting opportunities. Minimum standards are as set forth in § 5-7-22.

* * *

MINORITY-OWNED BUSINESS ENTERPRISE or MBE. A business (including, without being limited to, a sole proprietorship, partnership, corporation, joint venture or any other business or professional entity):

(1) Which is at least 51% owned by one or more minority persons, or in the case of a publicly owned business, at least 51% of all classes of the stock of which is owned by one or more minority persons;

(2) Whose management, policies, major decisions and daily business operations are independently controlled by one or more such minority persons;

(3) Which performs a commercially useful function;

(4) The size of which does not exceed the size limits established by rule; and

(5) Operating within the city's marketplace, which is the State of Texas, for at least three months prior to the date of application for certification.

MINORITY PERSONS. Those persons, whether citizens of the United States or lawfully admitted resident aliens, who are:

(1) Black or African-American (persons whose origins are in one of the Black racial groups of Africa);

(2) Hispanic (persons whose origins are in Mexico, Central or South America, Spain or any of the Spanish-speaking islands of the Caribbean, regardless of race);

(3) Native American (persons whose origins are in any of the original peoples of North America);

(4) Asian-American (persons whose origins are in any of the original peoples of the Far East, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian Subcontinent);

(5) Other groups, or other individuals, found by the Director pursuant to rule, to be socially and economically disadvantaged, and to have suffered actual social and economic discrimination and decreased opportunities to compete in city markets or to do business with the city; and

(6) For purposes of contracts funded by other sources, groups found to be eligible for the designation of DBE by such governmental sources.

* * *

PROJECT PARTICIPATION GOALS. The goals or subgoals established for a particular project or contract and calculated as authorized in § 5-7-20.

* * *

SUBCONTRACTOR. Any person or business enterprise providing goods, labor or services to a contractor if such goods, labor or services are procured or used in fulfillment of the contractor's obligations arising from a contract with the city Subcontractor includes every level of subcontracting required a fulfill a contract with the city. For purposes of this chapter, the term subcontractor includes subconsultants. Subconsultants are persons or business enterprises providing professional services to a prime consultant if such professional services are procured or used in fulfillment of the prime consultant's obligations arising from a contract with the city and includes every level of subconsulting required to fulfill a contract with the city.

SUBGOALS. The targeted levels established by the City Council for the annual aggregate participation of each group of minority persons and women in the procurement categories or market segments, or the targeted levels for the participation of each group of minority persons and women as project participation goals established pursuant to § 5-7-20.

* * *

§ 5-7-18 CERTIFICATION AND DECERTIFICATION OF MBEs AND WBEs.

(A) Only business enterprises which meet the criteria of Minority-Owned Business Enterprise, as defined in § 5-7-4 or Women-Owned Business Enterprise, as defined in § 5-7-4 may be certified for participation.

(B) All MBEs and WBEs must be certified prior to participating in the Program. Any business enterprise not previously certified by another governmental entity must be certified as either an MBE or WBE by the city's Department of Small and Minority Business Resources to be considered eligible by the city as a DBE for federally funded contracts.

* * *

(G) All MBEs and WBEs initially certified shall be reviewed for recertification by the Department of Small and Minority Business Resources on an annual basis. Failure of the firm to seek recertification by filing the necessary documentation with the Department of Small and Minority Business Resources within 60 days from the date of receipt of written notification from the Department of Small and Minority Business Resources shall result in decertification of the firm.

* * *

§ 5-7-22 PRE-AWARD COMPLIANCE PROCEDURES.

(A) In all solicitations for which a goal has been established for contracts, the city shall indicate its goals or subgoals for the use of WBEs and MBEs. All solicitation documents and the contract documents for all contracts for which a goal or subgoals have been established

shall contain: 1) a description of this chapter and Program; 2) the requirements related to achieving the goals or subgoals; 3) if goals or subgoals are not achieved, the requirement of documentation of the bidder's/proposer's good faith efforts, including the good faith efforts of minority persons and women bidders/proposers, to achieve the goals or subgoals.

(B) Achievement of goals or subgoals or documentation of good faith efforts applies to every contract for which goals or subgoals are established. . . .

* * *

(D) MBE and WBE subcontractors must be competitive with non-MBE/WBE subcontractors on price, quality, and delivery. MBEs and WBEs shall respond to relevant requests for quotations.

(E) Where the bidder/proposer cannot achieve the goals or subgoals, its Compliance Plan shall document its good faith efforts to achieve the goals or subgoals. Such good faith efforts will include, at a minimum, the following:

(1) Written notices to every MBE and WBE on the city's certified vendor lists for the project on specific scopes of work identified by the bidder/proposer for subcontracting opportunities not less than five business days prior to bid date. Such notices shall include information on the plans, specifications and scope of work, and bidding procedures, including the deadline for submission of quotes.

(2) Attendance at a pre-bid conference, if any, scheduled by the city to inform MBEs and WBEs of subcontracting opportunities under a given solicitation;

(3) Efforts made to define additional elements of the work proposed to be performed by MBEs and WBEs in order to increase the likelihood of achieving the goals or subgoals;

(4) (a) For those MBEs and WBEs responding affirmatively in writing to the notice required by paragraph (1) above, reasons why agreements were not reached, including written explanations for rejection of bids.

(b) If additional elements of work have been identified by the bidder/proposer as available for subcontracting, the bidder/proposer shall contact the Department of Small and Minority Business Resources or the DBE Officer to ascertain the availability of MBE and WBE contractors in those areas.

(5) Efforts to assist MBEs and WBEs with bonding, insurance, and financing, where appropriate.

(6) Seeking the assistance of the Department of Small and Minority Business Resources in contacting MBEs and WBEs;

(7) Such other and additional documentation or actions appropriate to demonstrate good faith efforts that are established by rule;

(8) If the bidder/proposer seeks to perform the work of the entire contract with its own work force, without the use of subcontractors, where the solicitation establishes the annual MBE goal and the WBE goal rather

than subgoals, the bidder/proposer shall certify in its Compliance Plan establishing good faith efforts that no use of subcontractors is its normal business practice. In addition, the bidder/proposer must document the firm's demonstrated capabilities of performing the work without the use of subcontractors by listing such examples as personnel, equipment, supplier agreements, and other similar scopes of work successfully completed with its own work force. This does not relieve the bidder/proposer of the responsibility to make good faith efforts to purchase goods, equipment and/or other services from MBEs and WBEs for the performance of the contract;

(9) For competitively bid projects for which project participation goals or subgoals have been established, the Director, in his discretion, may apply these additional criteria for the determination of whether the bidder's good faith efforts have been sufficient, and when using these criteria, notify all bidders of their application by issuing notice in the bid documents:

(a) Participation in an approved mentor-protégé and/or apprentice-intern training program;

(b) Engaging with MBEs and WBEs in joint ventures;

(c) Use of MBEs and WBEs in private sector projects;

(d) Affirmative hiring, retention and promotion of minority persons and women in the prime contractor's business, both public and private sector and

(e) Providing bonding, financing, insurance and technical assistance to MBE/WBE joint venture partners or subcontractors.

(10) The Director may use the additional criteria identified in division (E)(9) above for requests for proposals or requests for qualifications for which project participation goals have been established. These additional criteria will be for the purposes of providing additional evaluation points for assessing such proposals and/or qualifications statements. The Director shall indicate the use of these additional criteria in the solicitation documents.

* * *

§ 5-7-23 POST-AWARD COMPLIANCE PROCEDURES.

(A) Upon award of a contract by the City Council that includes goals or subgoals which are met, the goals or subgoals become covenants of performance by the contractor in favor of the city.

* * *

§ 5-7-28 SANCTIONS.

(A) The following violations of this chapter are unlawful and may be prosecuted at Municipal Court:

(1) Providing false or misleading information to the city in connection with an application for or challenge to certification, recertification or decertification as either an MBE or WBE;

(2) Providing false or misleading information to the city in connection with submission of a bid, responses to requests for qualifications or proposals, good faith

efforts documentation, post-award compliance, or other program operations;

(3) Substituting MBE/WBE subcontractors without first receiving approval for such substitutions; or

(4) Committing any other violations of the provisions of this chapter.

(B) A bidder, proposer, contractor, subcontractor or applicant for certification is subject to being barred or deemed nonresponsive in future city solicitations and contracts for a period up to five years, if it is found to have:

(1) Provided false or misleading information in connection with an application for certification or recertification;

(2) Provided false or misleading information in connection with the submission of a bid or proposal or documentation of good faith efforts, post-award compliance, or other program operations;

(3) Failed to fulfill contractuals goals or subgoals and thereby materially breached the contract; or

(4) Repeatedly failed to comply in good faith with substantive provisions of this chapter.

* * *

(H) In addition to other sanctions available to the city, the violation of any provision of this chapter may be included as an incident of breach in each contract.

* * *

MOTION FILED
APR 2 8 2000

(2)

No. 99-1591

IN THE
Supreme Court of the United States

JOHN GOODE,
d/b/a Mr. Bones BBQ,

Petitioner,

v.

CITY OF AUSTIN, TEXAS and
FINE HOST CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMERICANS FOR THE DEFENSE OF CONSTITUTIONAL RIGHTS, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

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21 pp

MOTION TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37(2)(b), Americans for the Defense of Constitutional Rights, Inc. (ADCR) , hereby moves for leave to file the *amicus curiae* brief bound herewith which supports the grant by this Court of the petition for a writ of certiorari in this case. Consent to filing this brief has been granted by Petitioner John Goode, but withheld by Respondents City of Austin and Fine Host Corporation.

ADCR believes that the brief bound herewith raises arguments not previously advanced in this case that may assist the Court in deciding the issues raised by Petitioner. Wherefore movant ADCR respectfully prays that this motion to file an *amicus curia* brief be granted.

This the 26th day of April, 2000,

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STATEMENT OF AMICUS INTEREST

Americans for the Defense of Constitutional Rights, Inc. (ADCR) is a non-profit corporation organized under the laws of North Carolina by the five original plaintiffs in *Shaw v. Reno*, 509 U.S. 630 (1993).[1] Because of their faith in the values of the Equal Protection Clause and their concern that racial gerrymanders and racial quotas are endangering those values and exacerbating, rather than reducing, racial divisions, these five citizens created ADCR.

Among ADCR's missions are to inform the public about some of the odious practices which currently threaten the goal of a "color blind society;" urge legislators and public officials to enact laws and issue decrees that will meet these threats; and, as a last resort, participate in litigation to eliminate procedures, methodologies, and social structures which polarize our citizens along racial lines. ADCR has filed *amicus* briefs in *Lawyer v. DOJ*, 117 S.Ct. 2186 (1997), and *Chen v. City of Houston*. ___ F. 3d ___ (5th Cir. 2000).

SUMMARY OF ARGUMENT

Petitioner John Goode, an African-America owner of a business, lost his catering contract with the city of Austin because he refused to submit to racial classification in the city's affirmative action program. Therefore, he does have standing to challenge that program, despite the fact that he is black. The assumption that Petitioner was automatically

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1. This brief was authored in whole by Robinson Everett and Seth Neyhart, counsel for Americans for the Defense of Constitutional Rights, Inc., who have no connection with or interest in petitioner or any other party. No counsel for any party assisted in preparation of this brief. In addition, no person or entity other than Americans for the Defense of Constitutional Rights, Inc. and their counsel made a monetary contribution to the preparation or submission of this brief.

benefitted by this program and therefore had no cognizable harm under the Equal Protection Clause is offensive, paternalistic, and turns the equal protection principle on its head.

Furthermore, the holding that Petitioner lacks standing to challenge an affirmative action program because he is black is inconsistent with this Court's rulings as to public contracts in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) and *The City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), as well as with its standing doctrine stated in its discussion of racial gerrymandering race based peremptory jury challenges. Petitioner's standing should be affirmed by this Court because he was personally subjected to a racial classification by a government agency which treated him unequally on account of his race.

The stigmatic harm caused by the use of racial classifications does the same damage in the field of public contracts that is done by race based criteria when used in the electoral process, *see, e.g., Shaw v. Reno,* 509 U.S. 630 (1993), or to the trial process. *See, e.g. Powers v. Ohio* 499 U.S. 400 (1991). While the question of whether his treatment was better or worse than that of whites is open to debate, it is undisputed that the city of Austin intended to treat Petitioner Goode unequally on account of his race. Therefore, he has standing under the Equal Protection Clause to challenge the City of Austin's affirmative action program.

ARGUMENT

I. PETITIONER GOODE HAS STANDING TO CHALLENGE THE CITY OF AUSTIN'S AFFIRMATIVE ACTION PROGRAM BECAUSE HE HAS PERSONALLY SUFFERED HARM BY THE USE OF ITS RACIAL CLASSIFICATION.

In a short, unpublished opinion the Fifth Circuit held that Petitioner John Goode, an African-American business owner, did not have standing to challenge the termination of his contract on racial discrimination grounds. Petitioner Goode was the owner of a barbeque restaurant (Mr. Bones Barbeque), which subcontracted under Fine Host Corporation to provide food services at city venues for the city of Austin, Texas.

After Mr. Goode refused to have his business certified as a Minority/Woman Business Enterprise. ("M/WBE"), his contract was terminated in August 1996 and Fine Host replaced him with a M/WBE certified business. The Fifth Circuit held *per curiam* that "[B]ecause the 'intentionally discriminatory race and gender conscious goals' of which Goode complains benefitted rather than injured him, we conclude that Goode lacks standing to attack their constitutionality." Appendix to Petition for Certiorari, at 4-5.

This holding offensively and paternalistically assumes that forcing John Goode to accept classification as separate and different from American citizens of other races and therefore needing special economic privileges to be able to compete with "normal" business owners benefits him, rather than injures him. This assumption stands the equal protection principle of the Fourteenth Amendment on its

head.[2]

Moreover, as Justice Scalia said in his concurring *Adarand* opinion, "under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the constitution's focus upon the individual." 515 U.S. 200, 239 (1995) (Scalia J., concurring).

Petitioner Goode was ordered by Respondent Fine Host Corporation to submit to being classified by his race in order to keep his contract and stay in business. When he refused to accept the indignity of racial registration, but insisted on being treated as an individual, his contract was terminated and given to another minority business owner who would conform. Thus, Petitioner personally suffered concrete and devastating harm due to the City of Austin's policy requiring racial classifications. Therefore, he does have "such a personal stake in the outcome of the controversy

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2. As Justice Thomas put it in his concurring opinion in *Adarand Constructors, Inc. v. Pena*:

"These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society . . . [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences." 515 U.S. 200, 240, 241 115 S.Ct. 2097, 2119 (1995) (Thomas J., concurring).

as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Adding insult to the very real injury that Petitioner Goode suffered, the courts below told him that he had no recourse for justice from the federal judiciary, because all he had to do to avoid any negative economic consequences was to certify himself as an African-American business owner. This "separate but better" approach to Equal Protection analysis assumes that no one can challenge racial classifications if an argument can be made that he or she would benefit from the classification, no matter how offensive this may be to the supposed recipient of that benefit.

Thus, the District Court below rejected the notion that its ruling "is analogous to preventing Rosa Parks from challenging the segregated seating arrangements on Birmingham's buses in the 1950s." Appendix to Petition for Certiorari, at 14. Instead, according to that court, "[T]he correct analogy is that a white bus rider on the Birmingham buses would not be able to challenge the segregated seating arrangements because he would not suffer an injury in fact sufficient to confer standing." *Id.*

According to this same faulty logic, a white person who challenged the segregated rail car system in *Plessy v. Ferguson* would also have lacked standing to bring such an action, even though on its face the Louisiana law in dispute stated that "[n]o person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to." 163 U.S. 537, 540 (1896).

This concept of standing in Equal Protection analysis is invidious and pernicious because it reinforces by law the

erroneous concept that racial classifications are a zero sum game; i.e. that there is a debtor race and creditor race, and that the defendant government helps one and hurts the other by its racial classification. The truth is, members of all races are harmed - as is society as a whole - when they are subjected to racial classifications. And Petitioner Goode, who declined to operate under this pernicious racial classification, personally suffered grievous harm from not acquiescing in the race-based system.

Beyond the obvious harm of losing his livelihood derived from selling food, Petitioner Goode was denied something even more fundamental. He was stripped of his right as an American citizen to be treated as an individual human being and not merely as a member of a particular racial class or ethnic group. He was not allowed to actually be equal. He was not treated equally under the law, and he was denied an equal opportunity to fail or succeed to that enjoyed by the rest of American society. Instead, he was told to accept his lot and take what he had coming to him because of his race - or else. This is his harm, and he has suffered it personally at the hands of the defendants.

Finally, the paternalistic assumption that Petitioner Goode was treated better by this program than a similarly situated white male is no reason for denying him standing. Even if it were true, something cannot be "better" without being unequal to something else. And under the plain wording of Fourteenth Amendment, Petitioner Goode has the right to be treated equally, not better or worse. This Court should state clearly that in interpreting the Equal Protection Clause of the Fourteenth Amendment, equal really means equal and every American has the right to be equal under the law.

II. THE EQUAL PROTECTION PRECEDENTS OF THIS COURT HAVE RECOGNIZED THE TYPE OF HARM THAT PETITIONER GOODE HAS SUFFERED IS SUFFICIENT TO CONFER STANDING.

The reasoning of the holding below is fundamentally inconsistent with the holding in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) that any person of any race has the right to demand strict scrutiny of any racial classification which subjects that person to unequal treatment. *See id.* at 223. Furthermore, it would follow from this reasoning that a person whose racial or ethnic group constituted a majority in a congressional or legislative district has no right to complain about racial gerrymandering, or that one could not complain about the exclusion of some other race from a jury, or that a member of a majority race could not complain about being precluded from marrying a member of a minority race, since the racial classification was intended to benefit the majority race to which the injured party belongs.

Thankfully, this Court has held otherwise.

A. The holding Below Is Inconsistent With This Court's Recent Decisions Concerning Government Affirmative Action Programs.

Under this Court's holdings in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995), "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.* at 224.

Therefore, "[to] whatever racial group these citizens belong, their "personal rights to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking. Absent

searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 493 (1989). "We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Id.* at 494. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.*

This Court has thus found it necessary for federal courts to subject all affirmative action programs by any governmental agency to strict scrutiny in order to determine whether or not they are strictly reserved to remedial settings and do not in fact promote notions of racial inferiority and lead to a politics of racial hostility. If, according to this Court in *Adarand Constructors, Inc. v. Pena,* "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny," 515 U.S. at 223, the Court of Appeals obviously erred in holding that Petitioner Goode lacks standing to challenge the City of Austin's affirmative action program because he is black. By its own terms, the City of Austin's affirmative action program was trying to treat Petitioner Goode unequally because he is an African-American.

In short, Petitioner Goode was personally subjected to a racial classification. This classification treated him unequally. The lower court's holding that this "separate but

better" treatment meant that Petitioner Goode suffered no real harm ignores the Court's pronouncement that the stigmatic harm of implied racial inferiority is a real, tangible, destructive, but often inevitable result of this kind of program.[3] According to both the letter and spirit of the affirmative action precedents of this Court, then, Petitioner Goode has standing because he was personally subjected to a racial classification that treated people differently according to race.

B. The Holding Below Is Inconsistent With This Court's Standing Doctrine In Its Racial Gerrymandering Decisions Under The Equal Protection Clause Of The Fourteenth Amendment.

In ruling against Petitioner Goode, the Fifth Circuit cited this Court's decision in *United States v. Hays* for the proposition that when "a governmental actor is discriminating on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." 515 U.S. 737, 744-745 (1995). However, this Court's treatment of the heavily discussed issue of standing in the *Shaw* line of cases does not support

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3. "Even though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception - especially when fostered by the Congress of the United States - can only exacerbate rather than reduce racial prejudice it will delay the time when race will become a truly irrelevant, or at least insignificant, factor ... Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries." *Adarand Constructors Inc. v. Pena*, 515 U.S. at 229.

the validity of the Fifth Circuit's holding, but instead seriously undercuts it. In *Hays*, the race of the plaintiffs was immaterial to their standing to challenge a racial gerrymander. Instead, all registered voters of any race have standing under *Hays* to challenge a racial gerrymander to which they been personally subjected, either by being placed inside the suspect district or by having been in some other way personally subjected to a racial classification. *See id.* at 745.

Indeed, the Court, over dissent, has consistently refused to factor in the race of the plaintiffs when determining their standing to challenge racial gerrymanders ever since *Shaw v. Reno*, 509 U.S. 630 (1993), was decided. There, the Court said about the Equal Protection Clause, "Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." *Id.* at 642. "Even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs. *Id.* at 648. "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. *Id.* at 643. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. *Id.* at 648.[4]

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4. In replying to Justice Souter's dissent, the Court's opinion explained further the stigmatic and representational harms that racial gerrymanders cause. "Justice Souter apparently believes that racial gerrymandering is harmless unless it dilutes a racial group's voting strength. As we have explained however, reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial

Thus, apart from issues of vote dilution, *Shaw* recognized "the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." *Id.* at 652.

This "analytically distinct" Equal Protection claim of *Shaw* is thus not based on a theory of group racial rights or voting strength, but is perhaps best understood as the right *not* to be classified by race. "[T]he essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." *Miller v. Johnson,* 515 U.S. 900, 911 (1995). "[S]o did we recognize in *Shaw* that it (the State) may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Id.* (citations omitted). "Where a plaintiff resides in a racially gerrymandered district, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Bush v. Vera*, 517 U.S. 952, 958 (1996).

Thus, under the *Hays* doctrine, "where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the

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stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. Justice Souter does not adequately explain why these harms are not cognizable under the Fourteenth Amendment. *Id.* at 650.

legislature's action." *U.S. v. Hays*, 517 U.S. 737, 745 (1995). "Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context." *Id.* "On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference." *Id.* "Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." *Id.* In *Hays*, the racially diverse group of plaintiffs did "not live in the district that is the primary focus of their racial gerrymandering claim, and they have not otherwise demonstrated that they, personally, have been subjected to a racial classification. For that reason, we conclude that appellees lack standing to bring this lawsuit." *Id.* at 759.[5]

This Court's standing doctrine in *Shaw* and *Hays* - a line of cases parallel to its affirmative action cases - cannot be understood without viewing it as a recognition that the Equal Protection Clause guarantees all Americans of all races the right to not be subjected to classification by race for the purposes of government action. Such racial classifications, as this Court has frequently stated, "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

Thus, the mere fact that a registered voter in a district has been personally subjected to a racial classification for the

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5. No condition is stated in *Hays* that the plaintiff not only must live in the district but also must belong to the minority race in the racially gerrymandered district.

purposes of the government redistricting action is enough to establish standing to challenge a racial gerrymander. It does not matter what race the citizen belongs to or what effect the gerrymander has on that citizen's ability to elect representatives of his or her choice. The harm that confers standing is the classification itself, and the inevitable stigma and racial divisions and turmoil that are inevitably attached.

In the case at bar, an affirmative action case, a member of the supposedly benefitted group was forced by the city of Austin and its contractor to stay in his racial pigeonhole on pain and penalty of losing his contract. Just as in the racial gerrymandering cases, Petitioner Goode's particular race ought not to be the dispositive factor as to his standing, but rather his personal subjection to a governmental racial classification that treats Americans differently on account of their race.

C. The Holding Below Is Inconsistent With This Court's Precedents Forbidding Race-Based Peremptory Jury Challenges.

In a similar vein, this Court's precedents as to peremptory challenges are at odds with the holding below. In particular, this Court has held that a criminal defendant "does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). Thus, the Court extended the holding of *Batson v. Kentucky*, 476 U.S. 79 (1986), which stated that a defendant could raise an Equal Protection challenge to the use of peremptories at his own trial by showing that the prosecutor used them to exclude members of the defendant's race.

The *Powers* Court rejected the state's contention that "in equal protection analysis the race of the objecting defendant constitutes a relevant precondition for a *Batson*

challenge." 499 U.S. at 406. In criticizing this argument, the Court states that "this limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law." *Id.*

In *Powers,* the Court rejected the view that "race based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors." *Id.* at 410. Instead, the Court stated "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967).

Similarly, in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the court ruled that *Batson* extended to gender-based peremptory challenges. "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *Id.*

Although the jury exclusion cases present unique issues which arise from the nature of the peremptory challenge and the assertion of the stricken juror's right by a third party, the underlying principle of *Powers* is relevant to this case. *Powers* takes a blanket approach to all racial classifications. Equal Protection analysis therefore does not hinge upon how the races are lined up in a particular case, but rather upon the existence of a governmental racial classification to which the complaining party has been subjected. Thus, the defendant has "the right to be tried by a jury whose members are selected by nondiscriminatory criteria," regardless of the respective races of the defendant

and the stricken jurors. *Powers*, 499 U.S., at 404.

Similarly, standing in affirmative action cases should not hinge on which race is supposedly benefitted or which race is supposedly burdened. As long as the plaintiff has been personally subjected to a racial classification for the purposes of government action, he or she has standing to challenge it and subject it to a strict scrutiny analysis.

D. The holding below is inconsistent with the Court's decision in *Loving v. Virginia.*

In *Loving v. Virginia,* 388 U.S. 1 (1967), this Court held that preventing marriages between persons solely on the basis of racial classifications violated the Equal Protection Clause of the Fourteenth Amendment. 388 U.S. 1 (1967). In its discussion of the Virginia statutory scheme prohibiting interracial marriages, the Court noted that "[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." *Id.* at 11.

In *Loving v. Virginia,* Mr. Loving was white and Mrs. Loving was African-American. If, as this Court noted, the purpose of the miscegenation statute in Virginia was to protect the purity and superiority of the white race against all others, then under the rationale of the decision below it would follow that only Mrs. Loving would have standing to sue and not Mr. Loving - whose race was supposedly benefitted by the law!

This, of course, was not the case. Both Mr. Loving and his wife were parties to the lawsuit and their standing was not in issue. *See Id.* at 1. Instead, the Court in *Loving* went to the merits of the case and held that "the Equal Protection Clause requires the consideration of whether the (racial) classifications drawn by any statute constitute an

arbitrary and invidious discrimination." *Id.* at 10.

In *Loving* the Court struck down Virginia's miscegenation statute as repugnant to the Fourteenth Amendment, and did so on the basis of a broad rationale. The court noted that "even assuming an even-handed state purpose to protect the 'integrity' of all races," the miscegenation statute of Virginia would be unconstitutional. *Id.* at 11 n.11. Thus, the Court held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12.

In *Loving,* as in all the Equal Protection precedents discussed above, the fact of the racial classification for the purposes of a government action was the essence of the constitutional wrong. The question of standing was not raised in *Loving* presumably because in this context it was obvious that both members of the interracial couple were seriously harmed by the challenged governmental classification.

On the other hand, the rationale employed by the Circuit Court for denying standing to Petitioner Goode would have denied standing to Mr. Loving but granted it to Mrs. Loving, since the statute in question was designed to protect the white race, just as the District Court below observed about the segregation laws applicable to Mrs. Parks. This ludicrous scenario demonstrates the inherent problems of trying to base Equal Protection analysis on a determination of whose racial ox is being gored. The true repugnance of the Virginia miscegenation statute to the Fourteenth Amendment, as this Court recognized in *Loving v. Virginia,* is the use of the racial classification itself.

CONCLUSION:

For the above stated reasons, this Court should grant appellant John Goode's petition for a writ of *certiorari* and reverse the holding below that he lacks standing to challenge the affirmative action program because he is black.

Respectfully submitted this 27th day of April, 2000.

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